Feb 28 2000

(33)

No. 99-699

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AND NEW JERSEY CATHOLIC CONFERENCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MARK E. CHOPKO*
General Counsel

JEFFREY HUNTER MOON
Solicitor

UNITED STATES
CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

*Counsel of Record

February 28, 2000

3288

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The New Jersey Definition of "Place of Public Accommodation" Eviscerates the Basic Rights of Private Organizations.	5
A. The Broad Definition of "Place of Public Accommodation" Transforms the Nature of Private Associations through Government Power.	5
B. If It Is Necessary to Reach the Constitutional Issues, Freedom of Association and of Expression Protect the Boy Scouts Against the Expansive Reading of State Public Accommodations Law. . .	11
II. A Private Association May Exclude From Leadership Those Who Do Not Share Its Mission and Purpose.	14
CONCLUSION	26

TABLE OF AUTHORITIES

PAGE

CASES:

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 9

Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) 20

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) 20

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670 (Cal. 1998) 25

Dale v. Boy Scouts of America, 160 N.J. 562 (1999) ..... *passim*

Dale v. Boy Scouts of America, 308 N.J. Super. 516 (N.J. App. 1998) 5

Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981) 23

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) 9

Gorsche v. Calvert High School, 997 F.Supp. 867 (N.D. Ohio 1998), *aff'd*, No. 98-3201 (6th Cir. April 13, 1999) 20

Hall v. Baptist Memorial Health Care Corp., 27 F.Supp.2d 1029 (W.D. Tenn. 1998) 20,22

Hart v. Cult Awareness Network, 13 Cal.App.4th 777 (1993) 22

Harvey v. Young Women's Christian Assoc., 533 F.Supp. 949 (W.D. N.C. 1982) 17,18

Hollenbaugh v. Carnegie Free Library, 436 F.Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978) 17

Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... *passim*

McConnell v. Anderson, 451 F.2d 193 (8th Cir.), *cert. denied*, 467 U.S. 1216 (1984) 16,17,24

McGuire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987) 19

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 9

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) 9,10

Randall v. Orange County Council, Boy Scouts,
17 Cal.4th 736 (Cal. 1998) 25

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 15

Rosario v. Rockefeller,
410 U.S. 752 (1973) 23

Streumph v. McAuliffe,
661 S.W.2d 559 (Mo.App. 1983) 15

United States Jaycees v. Iowa Civil Rights Comm.,
427 N.W.2d 450 (Iowa 1988) 7

United States Jaycees v. Richardet,
666 P.2d 1008 (Alaska 1983) 7

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871) 9,15

Welsh v. Boy Scouts of America,
993 F.2d 1267 (7th Cir.),
cert. denied, 510 U.S. 1012 (1993) 7

STATUTORY PROVISIONS:

Americans with Disabilities Act,
42 U.S.C. §12101, *et seq*. 20

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §2000e, *et seq*. 20

MISCELLANEOUS:

Codex Iuris Canonici (1983 Code of Canon Law)
(Vatican City: Liberia Editrice
Vaticana 1983), c.747, §2 6

1 *Corinthians* 9:16 (New American Bible) 6

Phillipians 2:15 (New American Bible) 6

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AND NEW JERSEY CATHOLIC CONFERENCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The United States Catholic Conference ("USCC") is a nonprofit organization, the members of which are the active Catholic Bishops in the United States.[1] The USCC is a vehicle through which the Bishops can speak cooperatively and collegially on matters affecting the Catholic Church, its people and society in general. The USCC advocates and promotes the pastoral teaching of the Bishops in such diverse areas of the

---

[1]Pursuant to Supreme Court Rule 37.6, counsel for these amici state that they authored this brief, in whole, and that no person or entity other than the amici made a monetary contribution toward the preparation or submission of this brief. Both parties have consented to the filing of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

Nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCC are the protection of the First Amendment rights of religious and associated organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The New Jersey Catholic Conference is composed of the Catholic Bishops of New Jersey. The New Jersey Catholic Conference's major objective is to provide a means by which the Bishops may speak on matters of public policy. In expressing the views of the Church, the Conference addresses a wide range of issues in the areas of morality, health, welfare, education and human and civil rights.

The Catholic Bishops condemn unjust discrimination against all people. That issue, however, is not genuinely presented in this case, except in the way it has been publicly postured. We believe that this case implicates a more narrow, common sense proposition, namely, that private associations may not be ordered to retain a leader who has acted contrary to an association's mission and purpose. We write to give special emphasis to this principle. This principle finds application in both common law and constitutional law, for to penalize a private institution for terminating a leader who acts contrary to the institution's moral code offends the First Amendment. This case presents the Court with an opportunity to resist a broad and intentional intrusion of government into the internal operations of private entities, in a way that is workable and practical.

SUMMARY OF ARGUMENT

This case poses the question whether this Court will venture again into the constitutional labyrinth of deciding what relationships and behaviors are properly protected by the First

Amendment and which are not. If it decides to venture into this maze, these amici suggests that there is only one way out, and that is to decide that the Boy Scouts' associational and expressive freedoms are protected by the Constitution. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The Boy Scouts of America, like many organizations, including many religious groups, teaches that homosexual conduct is wrong. That message is part of the moral code of Scouting as it is for many other organizations, especially religious groups. Whether one agrees with that message is irrelevant, as the First Amendment broadly protects the dissemination of messages, even those that some might think to be out of vogue.

For the judiciary effectively to direct the Boy Scouts to convey, through its Scout leadership, another and directly contrary message is indefensible and threatens the integrity of a wide range of American institutions. Churches and religious organizations and other groups that exist to promote strong social and moral messages, and take firm stands in support of those messages, are particularly at risk. Every moral message is, by its nature, a call to some value. In the process of implementing its values and conveying its message, through the choice of members, leaders, and others to act as exemplars, any organization that genuinely believes in its own values will select leaders who demonstrate those values in word and deed. The freedom to make those sorts of leadership decisions is part and parcel of the right to decide what the values of the organization are. Otherwise any organization would be at risk of being, as it were, "hijacked" by those with opposing views and turned to the service of the very concepts it most opposes. Whether the judiciary will countenance and enforce such stratagems is the primary question posed by the instant case. This Court should declare that such efforts, when aided by state law, are unconstitutional.

Constitutional issues, however, should not be decided by the courts when there is a sound, practical, and non-constitutional way that a case like the one at bar may be decided. This case should have been disposed of by operation of the common sense legal principle that private associations and institutions cannot be required to retain in a position of leadership a person who has acted contrary to the organization's own policies, purposes and values, and the messages it wishes to communicate to its members and the public. This principle applies when, as here, that person has attempted affirmatively and publicly to undercut one of the purposes of the organization because he thinks it is wrong.

ARGUMENT

The principal difficulty presented by the case at bar is that this Court has been placed in the position of either blessing the intrusive interpretation of a state public accommodation law or deciding that there are constitutional limits of degree on its reach. The Supreme Court of New Jersey has put this Court into a constitutional box -- defer or constitutionalize. If forced to decide that issue, the Court must decide that the federal Constitution bars the state intrusion. Here, however, the broad cast given the state statute threatens more than basic constitutional values. The expansive view taken below of the definition of a "place of public accommodation" implicates the association's constitutional rights, and would override one of the basic principles of employment and association law, namely that a private association may not be compelled to retain a leader who has demonstrated he does not share the institution's mission and purpose. That rule of law would apply if the Supreme Court of New Jersey had paid attention to the most basic rule of jurisprudence, that statutes should be construed to avoid constitutional problems.

The Boy Scouts of America, like many other private associations and religious institutions, holds that homosexual conduct is wrong. These amici hold that view. Although we recognize that others disagree, our view on the morality of homosexual conduct is part of our approach to the values that we teach and offer to this society. We might describe such conduct as sinful and to be avoided. For the Scouts, such conduct is not "morally straight." It therefore does not accept the volunteer services of those who would present themselves to Scouts as examples of the acceptability of homosexual conduct or behavior. Scout leaders are selected in order to provide a "'good example of what a man should be like'." *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 527 (N.J. App. 1998). An individual who publicly communicates the message that homosexual conduct is morally acceptable does not exemplify the values the Boy Scouts of America intends to convey.

I. The New Jersey Definition of "Place of Public Accommodation" Eviscerates the Basic Rights of Private Organizations.

A. The Broad Definition of "Place of Public Accommodation" Transforms the Nature of Private Associations through Government Power.

By definition, private associations are just that, "private" groups of like-minded citizens formed for limited purposes, to undertake a particular purpose or espouse a particular creed or mission. That a private association is organized for some purposes, again by definition, means it necessarily rejects those purposes outside of or antithetical to its charter. One may not always agree with the message or its appropriateness, but the First Amendment protects persons' rights to organize and profess what they believe without penalty from the government. By joining, a person says "I agree." By refusing to abide by the

standards of the organization, a person has effectively removed himself from the group. No organization may be ordered to retain a leader who affirmatively acts contrary to the beliefs and values of the organization. Every organization has the right to decide for itself the content of its own beliefs without having to submit to the sabotage of those who would challenge or undercut them. For a court to order private associations' policies and views to be overridden in such an instance implicates the courts in a potentially unconstitutional exercise.

Religious institutions are particularly vulnerable on this score. Christians, for example, are exhorted to live in the world, but not be part of it. *Phillipians* 2:15 (New American Bible). Christians are expected to be leaven for the world, to be part of the transformation of culture. Christian leaders are expected to preach the Gospel message in season and out of season, whether the world is agreeable to the message or not. 1 *Corinthians* 9:16 (New American Bible). The message of a religion may not always be in vogue, and those who practice seriously cannot be moved by the winds of the world to suppress or alter the message just because it is not popular. It is in the nature of religion to preach, and religious exercise and association for purposes of engaging in those exercises with like-minded believers is a basic human right. Code of Canon Law, canon 747, §2 (1983) ("To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order...."). At its heart a mission of the Church is the evangelization of culture.

The Supreme Court of New Jersey's interpretation of the "place of public accommodation" standard effectively imposes on a broad range of organizations that act by educating and evangelizing society and culture, as a matter of judicial fiat, purposes, goals, and obligations that they manifestly do not consider to be theirs. *Dale v. Boy Scouts of America*, 160 N.J. 562 (1999). The New Jersey court intentionally stretched words

beyond their ordinary meaning. While it recognized that the cases addressing the Boy Scouts or analogous organizations had decided they were not "places," *e.g.*, *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *United States Jaycees v. Iowa Civil Rights Comm.*, 427 N.W.2d 450 (Iowa 1988); *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983), the court below nevertheless extended the meaning of "place" to cover the Boy Scouts without regard to whether its activities took place at any particular geographic locations at all. *Dale*, 160 N.J. at 586-89. Moreover, the three factors that the court used to determine a "place of public accommodation" are so broad as to be applicable to almost any human enterprise -- including the religious ritual and conduct of religious denominations themselves.

First, the court said that Scouting engaged in "broad public solicitation" of new members. *Dale*, 160 N.J. at 583-91.[2] It is the nature of religious denominations to evangelize and invite the public to consider membership. But only those who would profess acceptance of those beliefs and avow them as their own may become members. In many religious bodies, actions contrary to the moral code may be subject to sanction, including excommunication or disfellowship. That such activity, rooted in religious belief, could be subject to review under a state antidiscrimination standard and be set aside

---

[2]The court below took upon itself the role of deciding how genuine the Boy Scouts' standards are, and so whether they actually act as selectivity criteria. *Dale*, 160 N.J. at 599-601. It resolved this simply by asserting that they are not "real impediments," since few are excluded, ignoring entirely the issue whether many disagree with these standards in the first place. *Dale*, 160 N.J. at 599. And then it asserted with no apparent factual support that the "Boy Scouts does not limit its membership to individuals who . . . subscribe to a specific set of moral beliefs," *id.* at 600, in the face of the Boy Scouts' demonstrated requirement that all Scouts must subscribe to the Oath and Law.

threatens the essential nature of religious groups in this society. The court's "broad public solicitation" standard would particularly penalize those churches which actively proselytize. That the court's standard would invite the State to dictate leadership decisions is frankly untenable.

Second, the court found a "close relationship to governmental bodies," *Dale*, 160 N.J. at 591, because the Boy Scouts at times conduct activities on government property and may collaborate with governmental entities, including the U.S. military. In an era of pervasive government, every organization that collaborates with government or participates in public programs is, therefore, under the lower court's approach, potentially a "place of public accommodation." Given the degree to which religious entities collaborate daily with the government in the provision of education, charity, and health care, few organizations would be beyond the reach of this statute as the New Jersey court interpreted it, no matter what their own views of their purposes and goals might be.

The court's third standard is entirely subjective, whether the Boy Scouts "resembles" other recognized "place[s] of public accommodation." As to this amorphous factor, the court concluded that Scouting appeared to be similar to Little League or a day camp because Scouts engage in recreational activities. *Dale*, 160 N.J. at 594. This "resemblance" allowed the court below to discard the Boy Scouts' own self-understanding, that it is not merely a recreational group but one that teaches profound moral lessons, as reflected in the Scout Oath and Law, and embodies an affirmative religious component. The court below arbitrarily excised vital aspects of Scouting's nature and purposes.[3] It is for the Boy Scouts alone to decide its value

[3]Because the First Amendment is clearly at issue, this Court has "an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964). In that review, no deference is due to the conclusions of the court below, including its conclusions about Scouting that Scouting itself contests as patently contrary to its mission and purposes. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995), this Court stated that "[t]his obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection...." Thus, "we are obliged to make a fresh examination of crucial facts." *Id.* This is "vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment" as is asserted here. *Bose, supra*, 466 U.S. at 503. "Regarding certain largely factual questions in some areas of the law, the stakes -- in terms of impact on future cases and future conduct -- are too great to entrust them finally to the judgment of the trier of fact." *Id.* at 501, n. 17.

system and message and what they mean in practice, and to enforce them with the degree of vigor it believes proper consonant with its own objectives and goals.

The Supreme Court of New Jersey, however, purported to determine what the actual or genuine nature of the Boy Scouts was. The court's view of the nature of Scouting, however, was and is contrary to Scouting's statement of its values and beliefs. The court then imposed legal consequences on the Boy Scouts based upon its revisionist view of the organization. This approach presents particular dangers not only to the Boy Scouts of America proper, but also to the many religious entities that sponsor Scouting units, and threatens their First Amendment rights as well. The courts of this country can never interpret, much less impose judicially, religious doctrine. This Court, properly, has been particularly careful not to make decisions that would imply the adoption or rejection of particular religious standards. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Presbyterian Church in the United States v. Mary*

Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). Courts may not interpret religious doctrine or determine its importance to a church. *Mary Elizabeth Blue Hull*, 393 U.S. at 450. Our Constitution allows religious entities the right to determine their own moral and religious standards without the interference of the state.

A variety of religious denominations sponsor thousands of Scouting units covering more than a million Scouts. These groups implement and convey their religiously based moral and social messages through their conduct and sponsorship of Scout units. Given Scouting's emphasis on traditional values, Catholic units consider Scouting a form of ministry to youth. Unless the decision below is reversed, not only Boy Scouts of America, but churches, synagogues, and other religious sponsors will be forced to provide tacit approval of Scout leaders whose conduct they find religiously and morally objectionable.

It is no answer to suggest that such religious groups could simply withdraw their sponsorship from all Scout units. The conduct of Scout units is an integral part of ministry for many denominations. The decision below presents religious entities with nothing but a "Hobson's Choice" -- either they must stop participating in Scouting as a way of teaching values and morals, or continue participating in Scouting under leadership that exemplifies the contrary of their moral teachings. Either way, damage inevitably results to the ability of religious entities to communicate religious and moral precepts. The Free Exercise implications of this decision, while not squarely presented in this particular case, are very real.

B. If It Is Necessary to Reach the Constitutional Issues, Freedom of Association and of Expression Protect the Boy Scouts Against the Expansive Reading of State Public Accommodations Law.

If the constitutional issues need to be reached, this case is clearly controlled by *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In *Hurley*, this Court unanimously reversed a Massachusetts decision that had broadly interpreted the state "public accommodations" law to apply to decisions of the South Boston Allied War Veterans Council, regarding who would be included in its annual St. Patrick's Day/Evacuation Day Parade. The Court found that the Veterans Council's decision to exclude an Irish-American gay and lesbian group ("GLIB") from the parade was constitutionally protected against the application of a broad state statute. *Id.* Because the Veterans Council had the First Amendment right to "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members," it was entitled to decide that GLIB could not participate in the parade. *Id.* at 581. Organizations may choose "not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

Extensive treatment of *Hurley* is beyond the scope of this brief and in any event will, properly, be offered by the Boy Scouts and other amici. But three particular facets of *Hurley* deserve discussion because they speak directly to the position these amici take here.

First, the Supreme Court of New Jersey asserted that Dale did not go to Boy Scout meetings "carrying a banner," has "never used his leadership position to promote ... any message inconsistent with Boy Scouts policies" and that Dale does not

want to participate in Boy Scout leadership " 'to make a point' about sexuality." *Dale*, *supra*, 160 N.J. at 623. This manifestly misconstrues the conduct involved here. Plaintiff's public statements to all who would listen or read newspapers (including, necessarily, individual boy scouts), voluntary assumption of a leadership position in an organization whose goals are diametrically opposed to the Scouts', and extensive use of the public media to criticize the Scouts are indeed precisely "carrying a banner" (like GLIB in *Hurley*). That "banner" promoted messages inconsistent with Scouting. Dale himself has said that it is, in fact, his goal to make a point about Scout policies -- that they are "bad and wrong." JA 513.[4]

Second, the plaintiff's conduct in the instant case is both far more expressive, and far more clearly contrary to the substantive ideas being urged by the defendants, than that of the plaintiff in *Hurley*. GLIB was formed simply to march in the parade, "to celebrate its members' identity as openly gay, lesbian and bisexual descendants of the Irish immigrants [and] to show that there are such individuals in the community...." *Hurley*, 515 U.S. at 570. GLIB merely proposed to "march behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.* GLIB made no social or moral statements either for or against positions taken by any of the other groups marching in the parade or the Veterans Council itself.[5]

---

[4]The New Jersey court's own analysis implicitly agrees that promoting opposing messages, taking leadership positions in support of them and making public that opposition as part of a campaign to change the Boy Scouts' views, is a fully legitimate reason for the Boy Scouts to decide not to use an adult's volunteer services as an Assistant Scoutmaster. *Dale*, 160 N.J. at 611, 623. That is precisely what is recognized by the cases discussed in Point II, below.

[5]For example, other marchers, but not GLIB, expressed positions on whether England ought to "get out of Ireland," or whether children ought to "say no to drugs." *Id.* at 569. That others were able to express views, while GLIB did not do so, was given no weight by this Court in its opinion. *Id.*

On the other hand, this plaintiff's avowed purpose in trying to become an Assistant Scoutmaster is to make a social, moral and political statement that *is contrary* to the Boy Scouts' position on the unacceptability of homosexual Scout leaders. Dale has repeatedly emphasized what he sees as a need for gay role models for gay teenagers, JA 517, 549, JA 497-98, and has said that he holds himself out as a role model for children. JA 502-3. Coupled with his unequivocal rejection of Scouting policy as "bad and wrong," JA 513, Mr. Dale's forced participation as a Scoutmaster would be as if this Court in *Hurley* had ordered the Veterans Council to include, in the parade, groups dedicated to proving that St. Patrick's Day and Evacuation Day were "bad and wrong" things to celebrate, or dedicated to opposing the multitude of other patriotic, religious, political and moral messages promoted by other participants. The Veterans Council could no longer decide what the messages of its parade would be.

Third, the New Jersey Supreme Court's decision intrudes upon private associations' rights to decide what their own missions and goals are, what positions they will espouse, and who will be retained as leaders within the organization. It does this by semantic "sleight of hand." The New Jersey court agrees that the Boy Scouts exist to teach moral values, and that it uses its activities to try to teach youth morally correct conduct. *Dale,* 160 N.J. at 613. But under cover of these comforting and unremarkable assertions, it also decides that the Boy Scouts cannot be permitted to determine the content or substance of these moral values. For example, it will not be allowed to interpret its own Scout Oath. It is not possible to teach moral values without teaching what those moral values are, any more than it is possible to teach American history without teaching what the history of America is.

The court below opined that Dale's termination as a Scoutmaster "appears antithetical" to Scouting's goals and philosophy, *Dale*, 160 N.J. at 618, but only because it had first effectively decided what goals and philosophy the Boy Scouts would be permitted to adopt. While the court claims that "the reinstatement of Dale does not compel the Boy Scouts to express any message," *id.* at 624, it ignores this Court's injunction that a "fundamental rule of protection under the First Amendment ... [is] that a speaker has the authority to choose the content of his own message," which necessarily incorporates the right to decide "what not to say." *Hurley*, 515 U.S. at 573 (citation omitted). The Supreme Court of New Jersey pays only lip service to the first part of this standard, and ignores the second entirely. In New Jersey the Boy Scouts of America is no longer permitted to decide what it "will not say" about who an appropriate person is to serve as a Scoutmaster. More importantly, the government, not a private institution, is determining who will lead a private association. That prospect, if the Court must decide it, is incompatible with the Constitution.

II. A Private Association May Exclude From Leadership Those Who Do Not Share Its Mission and Purpose.

A hallmark of private associations is that they exist by the joint commitment of their members. They are organized around a particular mission and purpose, and through the unity of the members who consent, implicitly or explicitly, to that mission and purpose. Those who do not consent, may withdraw. Normally, they may not use civil litigation as an agent for reform of the entity, its mission, or purpose.[6] The government

[6]This body of law is even more clear in regard to religious entities, whose members are united in a common bond of faith commitment. In *Watson v. Jones*, this Court said it would be a "vain consent" were members of a religious group able to litigate the terms and conditions of that membership in the civil courts. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). A proper remedy would be to withdraw from membership. *See Struemph v. McAuliffe*, 661 S.W.2d 559 (Mo. App. 1983), *cert. denied*, 467 U.S. 1216 (1984).

cannot force a private association to retain a leader who acts contrary to its mission or purpose.

This fundamental principle is central to *Hurley*, discussed *supra*, 515 U.S. at 573. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984), and its associated cases support this view that state statutes would *not* be read to "impos[e] ... restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." Likewise, in *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988), the Court wrote of a state human rights law that "[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the law erects no obstacle to this end."

The right of organizations to determine who will lead them has long been protected in the context of ordinary employment and voluntary associations. The instant case presents the archetypal situation which illustrates this principle. Mr. Dale has taken a public position contrary to that of the Boy Scouts. He made the matter known through his own participation in public events, interviews with news media, appearances on "talk shows" and news conferences. At relevant times he was an official or a representative of a group espousing beliefs contrary to those of the Scouts. More to the point, he stated that his intent in pursuing a voluntary leadership role with the Scouts was specifically to demonstrate his opposition to the goals, purposes, and beliefs of Scouting, and reform it. No organization is required against its will to welcome into its ranks

one who clearly intends, figuratively, to become the "monkey wrench" in its organizational "works." In such a situation, any organization is justified in concluding that such an individual's conduct, statements and other actions are a sufficient basis to deny even membership or participation -- let alone a meaningful leadership role.

This basic principle is well illustrated in the case law, outside of constitutional law. In *McConnell v. Anderson*, 451 F.2d 193 (8th Cir.), *cert. denied,* 405 U.S. 1046 (1972), a state university refused to hire a self-styled homosexual "activist" because his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University." *Id.* at 194. Particularly in view of plaintiff's actual conduct in using his application to work at the University as a platform to argue publicly about equality of rights for homosexuals, the Eighth Circuit held that the University had acted properly in rejecting his application:

> [I]t is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire ... to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval [of his viewpoint] upon his employer .... We

> know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands.

Id. at 196 (emphasis in original). Although decided thirty years ago, it is significant that the issue arose in an employment context and in a public institution. There principles would apply even more strongly in a private association setting.[7]

In *Harvey v. Young Women's Christian Association*, 533 F.Supp. 949 (W.D. N.C. 1982), the plaintiff, very much like Mr. Dale, wanted to retain her position with the YWCA with the "expressed intent to represent to her youth groups a philosophy and social concept contrary to those of her employer and in violation of her agreement to espouse the purpose and philosophy of the YWCA." *Id.* at 954. Specifically, plaintiff was a YWCA Program Director, conducting community outreach programs for low-income girls. The YWCA's goals were to develop the "mind, body and spirit of young women," *id.* at 952, which it interpreted as being inconsistent with the plaintiff's situation as an unmarried pregnant woman, since the YWCA desired to help unmarried girls avoid premarital sex and pregnancy. *Id.*

---

[7]To similar effect is *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied,* 439 U.S. 1052 (1978), which upheld the firing of two library employees, for "living together in a state of 'open adultery.'" The issue for the court was not the "rightness or wrongness" of the conduct involved or of the employer's reaction to it, *id.* at 1332, but whether the library Board could be compelled to reinstate them. "Like the Board of Regents in *McConnell* ... the defendants could reasonably conclude that by retaining plaintiffs as employees they would be giving 'tacit approval' to their conduct," which the court found was not legally required. *Id.* at 1333.

In entering judgment for the YWCA, the *Harvey* court wrote that its function was simply:

> to decide whether under the law the defendant would be required to retain in its employment a person who has made a conscious decision to bear a child while unwed and who felt that she could advocate or otherwise represent to the teenagers in the program she developed and maintained under the auspices of the defendant, an "alternative lifestyle" that is incompatible with the principles and goals of the defendant YWCA. This Court is not willing to require that an organization such as the YWCA, which according to the evidence is a movement rooted in the Christian faith, and which has ideals and goals to which the plaintiff apparently does not subscribe, to employ a person to teach teenagers in a program under its auspices "an alternative lifestyle," a lifestyle which is abhorrent to the ideals and goals of the defendant YWCA.

Id. at 955. Like the plaintiff here, whose goal it is to be an Assistant Scoutmaster as part of his program as a "gay activist" to prove how "bad and wrong" the Scouts' policies are, the plaintiff in *Harvey:*

> sought to remain in the employ of the defendant on her own terms; [presenting] a case in which the employee intended to pursue an activist role in implementing her unconventional ideas concerning societal status to be accorded unmarried mothers and thereby to foist tacit approval of this status upon an organization to which such conduct is contrary to its goals and

> principles; in this instance, the Young Women's Christian Association.

Id. at 956. The court found that no binding principle of law, including Title VII, required the YWCA to continue to employ plaintiff under those circumstances. *Id.*

Organizations are particularly free to reject those whose views and public positions are contrary to theirs, when it relates to the selection of leaders or teachers. In *McGuire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), a teacher with a Ph.D. in Religious Studies applied repeatedly for an Associate Professor's position in the Theology Department at Marquette University, a Catholic university operated under the auspices of the Society of Jesus and in accordance with its principles. She was not selected for the position because of her publicly voiced opposition to Catholic Church policy on abortion, described by the university as a "perceived hostility to the institutional church and its teachings, and to the goals and missions of Marquette." *Id.* at 1217. Plaintiff's own pleadings affirmed the dramatic distinctions between pro-abortion positions she advocated, and the policies of the university, and affirmed that the reason plaintiff desired to teach at Marquette was in order to point out and critique these differences. Plaintiff saw this as part of her personal effort to move Catholic moral teaching in a direction she desired. *Id.* at 1215-1217. The Seventh Circuit properly affirmed the dismissal of plaintiff's claims simply because she could not possibly have proven that discriminatory intent was the "but for" cause of the refusal to hire her. *Id.* at 1216. Rather, because plaintiff clearly opposed Catholic teaching as it was provided by Marquette, it could not be forced to allow plaintiff to teach there. *Id.*

It is especially important to permit youth-oriented organizations to decide for themselves what values are to be exemplified by those whom the organization puts forward as

"role models." In *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 411 (6th Cir. 1996), the court upheld the termination of an unmarried pregnant teacher for violating her religious school's policy requiring staff to present a "Christian example." Likewise, in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701 (8th Cir. 1987), the court affirmed the termination of a pregnant, unmarried instructor who, the Club determined, presented a "negative role model" to girls club members aged 8 to 18.[8] *Boyd* and *Chambers* support the right of organizations to permit only those who agree with their beliefs and values to become leaders charged with the exemplification and communication of those values to others, and also support the larger concept that it is for the organization alone to determine what its rules mean in practice.

Direct conflicts between an organization's beliefs and those of an individual who wishes to participate in it are all the more important where the individual has taken on a public leadership role in a group which opposes the values and principles of the organization he wishes to join. A prime example of this concept is presented in *Hall v. Baptist Memorial Health Care Corp.*, 27 F.Supp.2d 1029 (W.D. Tenn. 1998). Plaintiff in *Hall* was hired as a Student Services Specialist at the Baptist Memorial College of Health Services. Part of her job was to interpret school policy to ensure that student activities were congruent with the College's goals and objectives. The College was affiliated with the Southern Baptist Convention and adhered to its views that homosexuality was sinful and wrong. At the same time, plaintiff began to attend a church that accepts and is oriented to serving the religious needs of practicing gay

[8]To similar effect is *Gorsche v. Calvert High School*, 997 F. Supp. 867 (N.D. Ohio 1998), *aff'd*, No. 98-3201 (6th Cir. April 13, 1999), holding that an individual guilty of adultery, committed contrary to her obligation to behave in conformity with "values of the Catholic Church," could not make out even a *prima facie* case of discrimination under Title VII, 42 U.S.C. §2000e, *et seq.*, or of the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.*

and lesbian members, and thereafter was ordained a minister of that church. When this came to the attention of College authorities, plaintiff was removed from her job because of what the College concluded was an obvious conflict between that job, where she exercised influence over students and their behavior in order to bring them into line with the religious and other positions of the College, and her role as a leader of a church which openly espoused contrary views.

Plaintiff's Title VII claim failed "for failure to prove that Defendant's articulated reason for terminating her was pretextual. Defendant asserts that it terminated Plaintiff because she had assumed a leadership role in an organization espousing beliefs diametrically opposed to those held by the College itself." *Id.* at 1038. In fact, plaintiff's supervisors:

> perceived a conflict between Hall's leadership position in an organization which publicly embraced and supported homosexuals and her employment at the College founded by and affiliated with those who consider homosexuality to be a sin and perversion in the eyes of God.... Plaintiff has not offered any evidence to rebut Defendant's claim that it terminated Plaintiff because of her assumption of a leadership position in an organization which publicly expressed beliefs about homosexuals contrary to those held by the Defendant.

Id. The court noted that it made no difference whether the conflict between Hall's actions and the College's beliefs meant that plaintiff had failed to establish a *prima facie* case of discrimination, or was more properly seen as constituting a legitimate nondiscriminatory reason for her termination. *Id.* at 1038. The court said summary judgment for the College would have been entered even without the College's exemption from

Title VII coverage for religious discrimination. *Id.* at 1037. However verbalized, it is the right of an organization to decide not to embrace those who act in a way calculated to demonstrate their opposition to the organization's tenets.[9]

This legal principle is applicable to widely differing sorts of organizations. In *Hart v. Cult Awareness Network*, 13 Cal. App.4th 777 (1993), a California appellate court upheld a limiting construction of a state civil rights statute, so as to permit the Cult Awareness Network ("CAN-LA") to exclude from its membership an adherent of the Church of Scientology. CAN-LA existed to alert people to what it said were dangers posed by Scientology. Membership in CAN-LA was limited to former members of Scientology, and others, who opposed their beliefs and practices. *Id.* at 781-784. Under a broader reading of the statute, CAN-LA would have been a "business establishment" and so would have been required to permit plaintiff to join. This, the court held, would infringe upon CAN-LA's and its members' constitutional rights to promote and disseminate their views of Scientology. Quoting *Roberts*, 468

[9]The court in *Hall* understood the plaintiff's arguments to pose constitutional risks as well. Plaintiff argued that the College's asserted reason for removing her, that she had assumed a leadership role in a church with beliefs contrary to the College's, was pretextual because another College employee had also been ordained -- in a different religion -- and the College did not remove that employee although the ordination of women was itself a practice with which the College did not agree. *Id.* The *Hall* court rejected plaintiff's suggestion that a civil court could second-guess an organization's decisions about what principles they should uphold, or how strongly, or who should serve in their leadership positions. The court wrote: "the most troubling aspect of Plaintiff's argument is that it places the federal courts in a role contrary to the spirit of the First Amendment. In essence, the Plaintiff is requesting this court to tell the Defendant that it must be opposed to the ordination of women with the same degree of conviction and intensity it has expressed in its opposition to the gay and lesbian lifestyle, or suffer liability under Title VII." *Id.* at 1039. As noted above in Point I, the constitutional consequences of interfering with the Boy Scouts' expressive and associational freedoms are of similar dimension.

U.S. at 622-23, and using language that directly applies to the instant controversy, the court in *Hart* held that:

> implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends .... There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Hart, 13 Cal.App. 4th at 790. In the end, appellant "plainly admits that *his purpose is to inform CAN-LA about Scientology so as to challenge, if not change*, CAN-LA's belief that Scientology is a destructive cult. This purpose is incompatible with CAN-LA's work in counseling and providing support for ex-cult followers and the families of current cult followers." *Id.* (emphasis supplied.) That principle would seem dispositive of the case at bar.[10]

Mr. Dale's conduct was clearly calculated to make his disagreement with the fundamental values of Scouting as plain

[10]This Court has also recognized that even political parties have the right to prevent their ranks from being intruded upon by those with differing political principles. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981); *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). Organizations that exist, like the Scouts, to promote shared value systems also have "the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party, supra*, 450 U.S. at 122.

as possible. Mr. Dale decided to take on a leadership position as Co-President of the Lesbian/Gay Alliance of Rutgers University, and gave media interviews in that capacity referring to what he described as a need for gay "role models" for gay teenagers to focus on. JA 515-18. He described his participation in "gay politics" at Rutgers as "very active" and said that he "took up leadership roles" in that regard. JA 468-69. He intentionally "maintained a high profile on campus" representing gay interests. JA 503. And the reason he gave at deposition for pursuing litigation to secure an Assistant Scoutmaster position, was "to point out to [the Boy Scouts] how bad and wrong" their policy was, not to teach or model the values of Scouting as the organization conceived of them. JA 513. His goal is simply to change the policies of the Boy Scouts to make them more congruent with his ideas, not to participate in Scouting as it is currently oriented.[11] Mr. Dale should not be permitted to secure this Court's assistance to "foist tacit approval" of his views on an organization that rejects them. *McConnell, supra*, 451 F.2d at 186.

Mr. Dale had "promised to live by the Scout Oath," had agreed to uphold the Scout Law, and stated that he tried to live in accordance with them. JA 113-14. But he desires to decide for himself how those standards should be interpreted and enforced, and to continue to participate as a leader on his terms, not Scouting's. Dale may no more do this than the plaintiff in *Harvey* could legitimately subvert the goals of the YWCA by "modeling" for young girls the "alternative lifestyle" of being an

---

[11]Mr. Dale was well aware, before he participated in the media interviews reported in the July 8, 1990 newspaper article, as Co-President of the Lesbian/Gay Alliance and took the policy positions enunciated there, JA 515-8, that his views on homosexuality were contrary to those of the Boy Scouts. In a subsequent interview Mr. Dale said, "I realized I'd be risking things, and I knew that this [his role in Scouting] would be one of them," JA 510-12, referring to his appearance in the July 8, 1990 article and his participation in the gay youth conference upon which it reported.

unwed mother, *Harvey, supra*, 533 F.Supp. at 951-955, or the plaintiff in *McGuire* could teach theology from "the perspective of the Roman Catholic tradition" by teaching alternative views on abortion. *McGuire, supra*, 814 F.2d at 1215, 1217. The institution involved, whether the YWCA, Marquette University or the Boy Scouts of America, is entitled to decide the content of its own values and principles.

Indeed, the two most closely analogous opinions, *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal.4th 670 (Cal. 1998), and *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal.4th 736 (Cal. 1998), turn fundamentally on this same theory. In *Curran*, the California Supreme Court held that that state's public accommodations statute did not apply to the Scouts because its "primary function is the inculcation of a *specific set* of values." *Curran*, 17 Cal. 4th at 697 (emphasis supplied). As here, "plaintiff does not share the views promoted by the organization he seeks to join; to require the Boy Scouts to accept him as an assistant scoutmaster would restrict the organization's ability to exclude an individual with a contrary ideology or philosophy." *Id.* at 725-26 (Kennard, J., concurring). The Boy Scouts in *Curran* and *Randall* were not required to embrace a leader or member who rejected precisely the "specific set" of values in which the Scouts believed. *Id.* at 697. The conceptual underpinning of all of these cases -- that no organization can be required to embrace, as a member or a leader, one who espouses beliefs contrary to the organization -- is largely the same, whether the defendants are schools, colleges, libraries, girls clubs, political groups or networks organized to pursue particular social policies, or even, as here, the Boy Scouts.

CONCLUSION

The decision of the Supreme Court of New Jersey threatens the ability of a broad range of social, political, and

religious groups to define their own missions and purposes and retain leaders willing to implement them. It defies common sense to force a group to retain a leader who has publicly stated he wants to change the group because he believes its views are wrong. If a State nonetheless asserts it has that power, then the exercise of that power must be restrained by the Constitution.

The decision below should be reversed.

Respectfully submitted,

MARK E. CHOPKO*
General Counsel

JEFFREY HUNTER MOON
Solicitor

UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

February 28, 2000

*Counsel of Record